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IN THE
Supreme Court of the United States

OCTOBER TERM—1945

No. 983

AGWILINES, INC.,

Petitioner,

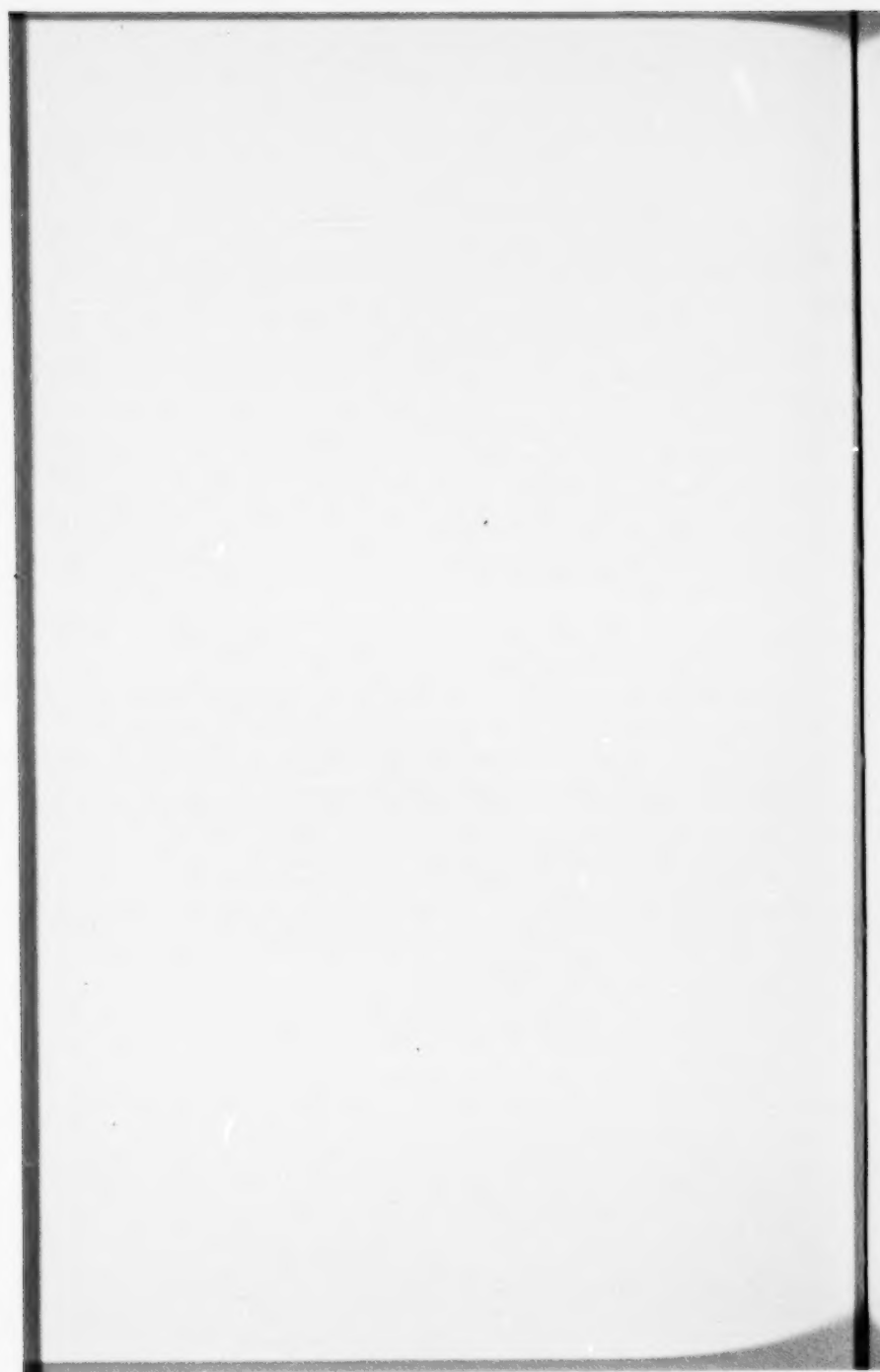
against

M/S SAN VERONICO, her engines, etc., EAGLE OIL & SHIPPING
Co., LTD.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT AND BRIEF IN SUPPORT THEREOF**

CHAUNCEY I. CLARK,
EDWARD A. NEILEY,
WILLIAM E. COLLINS,
Counsel for Petitioner.



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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Agwilines, Inc., respectfully shows:

The petitioner seeks to review the determination by a divided Court (R., pp. 66-78) of the Circuit Court of Appeals for the Second Circuit, affirming the decree of the District Court for the Southern District of New York (R., p. 58) which confirmed the report of a commissioner in a suit in admiralty (R., pp. 37-52), disallowing in part a claim of petitioner for damages due to the detention of its steamship *Agwidale* as a result of a collision between that vessel and the respondent's motorship *San Veronico*.

Statement of the Matter Involved

Petitioner libeled the *M/S San Veronica* for damages sustained by its steamship *Agwidale* in collision with the *San Veronica* on June 5, 1943 (R., pp. 2-4). By agreement, an interlocutory decree (R., p. 5) was entered in favor of petitioner for 85% of its provable damages with an order of reference to a commissioner to take evidence and report. By stipulation submitted to him, all facts were agreed (R., pp. 8-10).

The only question before the commissioner was the important question of law as to the amount which petitioner should recover for the detention of its time chartered vessel for the period of nine days during which she was admittedly out of service as the proximate result of the collision.

The *Agwidale* was, at the time of collision, under time charter (R., pp. 11-37) to the United States as represented by War Shipping Administration, and pursuant to the terms thereof (Clause 4, R., pp. 19-21), her owner was paid only half charter hire during the period of collision repairs. It was paid full charter hire by War Shipping Administration for an additional period, included in the total, of nine days during which the *Agwidale* was awaiting convoy (R., p. 9). The owner of the *San Veronica* contended and the commissioner and the Courts below held, that petitioner's recovery for the loss of use of the *Agwidale* was limited to the amount of hire which was deducted by the War Shipping Administration pursuant to the above cited charter provisions in cases of collision damage, plus certain expenditures for fuel and water, which under the charter terms, it was also obliged to bear and for which it had not been reimbursed.

As stated by the Circuit Court of Appeals (R., p. 67), the statement of the commissioner, based on the agreed stipulation, is not disputed as a correct statement of the facts, so that the sole question before the Courts below was one of law.

Jurisdiction

The jurisdiction of this Court to entertain this petition and to grant it is provided by Section 347 of Title 28 of the U. S. Code.

Question Presented

The sole question is whether the recovery of a ship-owner for the loss of use of his vessel due to collision is to be reduced by the amount of payments received by him pursuant to a charter agreement with a third person, or whether, as petitioner contends, the tortfeasor is not entitled to reduce his liability by reference to such a contract, which is as to him *res inter alios acta*.

Rulings of the Courts Below

The commissioner *held*, that in cases involving the detention of chartered vessels, the charter hire is *the* measure of damages rather than a *prima facie* basis for determining such damages; that the claim therefore was for charter hire and to the extent that libelant had been paid partial hire by the United States it had sustained no loss; thus treating the claim as one for special damages (R., pp. 41, 43). The commissioner rejected as inapplicable to a

contract for the hire of a ship (R., p. 49), the authorities cited *infra*, and discussed at length in the opinions of the Circuit Court of Appeals, particularly the dissenting opinion of Clark, C. J. (R., pp. 68, 74), holding that a tortfeasor is not concerned in the determination of his liability with the benefits received by his victim from payments made by a third person, whether pursuant to contract or otherwise. The District Court similarly held, in a brief opinion, adopting the commissioner's report, that these authorities "are not really applicable to a technical admiralty situation" (R., p. 57).

The Circuit Court of Appeals (all three judges concurring on this point) properly disagreed with the ruling of the lower Court, as embodied in the commissioner's opinion, that the charter hire is *the* measure of the damages sustained by a time chartered vessel and held that the proper measure is the value of the use of the vessel of which in this case the charter hire was the only evidence (R., pp. 69, 71). As the Court held, in the case of chartered vessels, the charter hire is only *prima facie* evidence of the value of the vessel's use. *The Yaye Maru*, 274 Fed. 195, 200 (C. C. A. 4); *The Brand*, 224 Fed. 391, 394-5 (C. C. A. 3).

The majority of the Court held, however, that the petitioner had sustained no loss except to the extent of the deduction of charter hire (R., pp. 68-9). It, therefore, treated the suit as a claim by the charterer for damages due to the collision. Thus viewing the claim, the majority of the Court felt reluctantly bound by the opinion, if not the decision of this Court in *Robins Dry Dock & Repair Company v. Flint*, 275 U. S. 303, and suggested that if any change is to be made in what the Court conceived to be the law, this Court should make it (R., pp. 69-71).

Circuit Judge Clark in a very full dissenting opinion expressed the view that this Court did not decide the question in the *Robins Dry Dock* case, but indicated, on the contrary, that a claim for the damages here involved should be sustained (R., pp. 71-3). The dissenting opinion further observes that the majority is in conflict with the well settled principle of the law of damages as recognized in the decisions of other Circuit Courts of Appeal that the tortfeasor cannot reduce the amount of his liability by the sum of payments received by his victim from collateral sources (R., pp. 74-6).

It is submitted that the majority opinion below, after recognizing the principle, erred in failing to apply it to the facts presented.

Reasons for Granting the Petition

1. The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court. In *Propeller Monticello v. Mollison*, 17 How. 152, 155; *The Cayuga*, 14 Wall. 270; *The Favorita*, 18 Wall. 598, 603, this Court held that the tortfeasor must make satisfaction for the wrong he has done, irrespective of arrangements made by his victim to which he is not a party. See also *National Labor Relations Board v. Marshall Field & Co.*, 129 Fed. (2) 169, 172 (C. C. A. 7); aff'd *per curiam*, *Marshall Field & Co. v. Board*, 318 U. S. 253.

2. If the decisions just cited are not controlling, the Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court. While the decisions just cited were relied on in the dissenting opinion of Judge Clark,

the majority of the Court felt bound, with evident reluctance, by the decision of this Court in *Robins Dry Dock v. Flint*, *supra*, relying upon certain language of this Court's opinion in that case. The dissenting opinion, on the other hand, relies on certain other language of the opinion for its view that this Court's decision did not preclude recovery on petitioner's claim but, in fact, suggested that such recovery was possible in a proper case. There is thus a question as to the scope of this Court's decision in the *Robins* case which should be clarified.

3. The Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeal on the application of a fundamental principle of damages. *S. H. Kress Co. v. Bullock Shoe Co.*, 56 Fed. (2) 713 (C. C. A. 5); *Chicago etc. Transit Co. v. Moore*, 259 Fed. 490, 505 (C. C. A. 6); certiorari denied; 251 U. S. 553. (See annotation 128 A. L. R. 687.) *National Labor Relations Board v. Marshall Field & Co.*, 129 Fed. (2) 169, 172 (C. C. A. 7); aff'd *per curiam*, *Marshall Field & Co. v. Board*, 318 U. S. 253.

The cases cited apply the rule that the tortfeasor's liability is not to be cut down by consideration of amounts received by him whom he has wronged either by way of gift or as a result of contract which he has had the wisdom to make. The majority and minority opinions below explicitly recognize the validity of this doctrine as set forth in Restatement, Torts, Section 920 (e), but the majority does not apply it. The rules of damages in admiralty are not *sui generis* but merely a part of the common law of damages. *The Cayuga*, 14 Wall. 270; *The Argentino*, 14 Appeal Cases (House of Lords) 519; *Roscoe, Damages in Maritime Collisions*, Third Ed., page 1; *The*

Law Times, Volume 159, page 301. See also *31 Michigan Law Review*, page 978.

4. The question presented is one of great importance to the admiralty bar and the shipping industry. Many other cases involving large sums of money depend upon the decision.

AGWILINES, INC.,

By CHAUNCEY I. CLARK,

EDWARD A. NEILEY,

WILLIAM E. COLLINS,

Counsel.

New York, N. Y.,

March 18, 1946.

Certificate

We hereby certify that we have examined the foregoing petition; that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

CHAUNCEY I. CLARK,

EDWARD A. NEILEY,

WILLIAM E. COLLINS,

Counsel,

27 William Street,

New York 5, N. Y.

New York, N. Y.,

March 18, 1946.